United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

75-7173

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE SECOND CIRCUIT

DOCKET NO. 75-7173

B

BROOKHOLLOW ASSOCIATES,

Plaintiff,
Appellants.

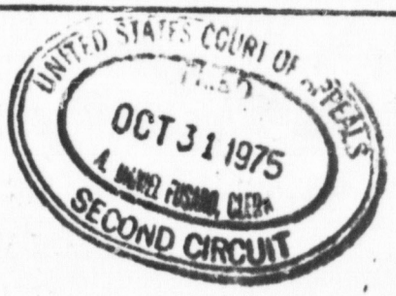
vs.

WARREN ANDRULOT, D/B/A ANDRULOT ASSOCIATES, GRAYCE M. ROSE, IN HER CAPACITY AS ASSISTANT TOWN CLERK OF THE TOWN OF WALLINGFORD IN THE STATE OF CONNECTICUT

Defendants,
Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT

BRIEF OF THE APPELLEE



EDWARD T. LYNCH, JR.
Of New Britain, Connecticut
Attorney for the Appellee
P.O. Box 349
33 Lexington Street
New Britain, Connecticut

To be argued by:
EDWARD T. LYNCH, JR.

TABLE OF CONTENTS

TABLE OF CASES

STATUTES

STATEMENT OF ISSUES

1. Whether the United States Circuit Court of Appeals should dismiss this appeal because the Connecticut Supreme Court has already acted to declare mechanic's liens unconstitutional effectively rendering the present action moot.

2. Whether the United States Circuit Court of Appeals should take jurisdiction on the basis of the enactment of P.A. 75-418.

3. Whether the United States Circuit Court of Appeals should assume jurisdiction over the other claims of the Appellant in light of the rule of Tucker vs. Maher, 497 F. 2d 1309 (2nd Cir., 1974), cert den. 419 U.S. 997 (1974).

4. Does the Defendant's reliance on P.A. 75-418 constitute State action and raise a substantial federal question?

STATEMENT OF THE CASE

A. Nature of the Case and Proceedings in the United States District Court.

The Plaintiff-Appellant commenced this action in the United States District Court of the District of Connecticut as an action for permanent injunction and for damages under 42 USC Section 1983 and for a declaratory judgment pursuant to 28 USC Section 2201. The Plaintiff also asserted jurisdiction under 28 USC Section 1343(3) and (4) and 28 USC Section 2201.

The substance of the appellant's claim is that the Connecticut mechanic's liens statutes, on their face and as applied to appellant, violate the due process clause of the Fourteenth Amendment to the United States Constitution.

The action was heard by the District Court upon the appellant's motion for convening a three-judge court, and upon such consideration the District Court dismissed the appellant's complaint, on its own motion, for failure to present a substantial question.

Thereafter the Connecticut Supreme Court declared mechanic's liens to be unconstitutional and immediately the General Assembly enacted P.A. 75-418 to allow validation of mechanics liens. The Defendant, Warren Andrulot, through his trial counsel, Attorney James H. Throwe duly complied with the new public act and again perfected the mechanics lien.

B. Statement of Facts.

Appellant is the owner, developer and general contractor of the Brookhollow Health Care Facility located in Wallingford,

Connecticut. On July 25, 1974, the Appellee, Warren Andrulot, issued a certificate of mechanic's lien, in which he asserted that he was owed certain money for furnishing materials and rendering services in the construction of the Appellant's facility pursuant to a contract with a subcontractor of the Appellant. That money is still owed by the Plaintiff. The certificate was lodged with the Town Clerk of Wallingford and recorded on the Land Records of that Town on July 30, 1974, by the Assistant Town Clerk of Wallingford, Appellee, Grayce M. Rose.

As authorized by Sections 49-33 through 49-37 of the Connecticut General Statutes, the issuance and recording of the above-described certificate of mechanic's lien was accomplished by the Appellees without the prior approval, review or other intervention of any judicial official or person other than the Appellees or any State action. Subsequently, the Plaintiff substituted a bond for the mechanic's lien as provided for in the Connecticut General Statutes and the Defendant, Warren Andrulot, released the lien. Not having paid the Defendant, Warren Andrulot, for the work done, the Plaintiff then brought action in the United States District Court.

A R G U M E N T

I

The Plaintiff's appeal should be dismissed as moot since it no longer presents a case or controversy as required by Article III of the Constitution.

On April 22, 1975, the Connecticut Supreme Court upheld a Superior Court decision and ruled that the Mechanics lien statutes are unconstitutional in"...that the absence of a statutory provision for a hearing for the Defendants at a meaningful time and in a meaningful manner;...has deprived them of their constitutional rights to due process of law as those rights have been recently enunciated by the United States Supreme Court." Roundhouse Construction Corporation v. Telesco Masons Supplies Company, Inc., et al _____ Conn. _____; 36 Connecticut Law Journal 1,6 (April 22, 1975). Having so ruled, the issues presented by the Appellant's Appeal have become moot and this Court should dismiss the appeal.

There is no reason for the Federal Court to rule on the constitutionality of a state statute which has already been found unconstitutional by the state's own highest court, and it has been the policy of the Federal Courts to dismiss actions that have become moot. Greater Houston Chapter of A.C.L.U. v. Houston Independant School District, 391 F2d 599 (CA Texas, 1968); Morrison Cafeteria Co. of Nashville, Inc. v Johnson 344 F2d 690 (CA Tenn, 1965); US ex rel Eisler v District Director of Immigration and Naturalization of Port of New York 162 F2d 408 (CCA, NY, 1947).

Moreover, subsequent to the filing of the memorandum of decision

by the District Court on February 10, 1975, and subsequent to the Roundhouse decision, the Connecticut General Assembly enacted Public Act 75-418 which became effective June 25, 1975. That act contained special provisions concerning the action which should be taken in the event that a bond had been substituted for the mechanic's lien as had been done in this case. This act reads in part

> Sec. 9. Whenever prior to April 22, 1975, a bond has been substituted for any lien pursuant to section 49-47 of the general statutes, as amended by Section 8 of this act, which bond was in effect on said date, the obligee on such bond may validate the lien for which the bond was substituted by serving, by registered or certified mail, upon the principal and surety, on such bond a copy of the certificate of mechanic's lien which was originally filed, within ninety days of the effective date of this act. Any such lien not validated pursuant to this section shall be deemed to have been invalid and discharged as a matter of law.

The defendant, Andrulot, has complied with the foregoing section and had provided this court with an affidavit attesting to compliance as part of his motion to dismiss. Whatever may have been the situation prior to the enactment of P.A. 75-418, it is clear that the Plaintiff may now seek a determination of the validity of the mechanic's lien in the state courts in accordance with Section 6 of the act which provides that

> (b) Whenever a bond has been substituted for any lien pursuant to this section:
> (1) The principal or surety on such bond, if no action to recover on such bond is then pending before any court, may make application, together with a proposed order and summons, to the superior court or the court of common pleas for the county of judicial district in which such action may be brought, or to any judge thereof, that a hearing be held to determine whether the lien for which such bond was substituted should be declared invalid or reduced in amount. The court or judge shall thereupon order reasonable notice of such application to be given to the obligee on such bond and, if the application is not made by all principals or sureties on such bond, shall order reasonable notice of such application to be given to

all other such principals and sureties, and shall set a date for the hearing to be held thereon. If such obligee or any principal or surety entitled to notice is not a resident of this state, such notice shall be given by personal service, registered or certified mail, publication or such other method as the court or judge shall direct. At least four days notice shall be given to such obligee, principal and surety entitled to notice prior to the date of such hearing.

The question of mootness is one which a federal court must resolve before it assumes jurisdiction. DeFunis v. Odegaard, 40 L Ed. 2d 164, 169 (1974); North Carolina v. Rice, 404 U.S. 244, 246 30 L. Ed. 2d 413 (1971). Federal courts are without power to decide questions that cannot affect the rights of the litigants before them. DeFunis v. Odegaard, supra, at 168; North Carolina v. Rice, supra.

The enactment of Public Act 75-418 significantly changes the character of Plaintiff's suit. A case is to be viewed in light of presently existing law, not the law as it stood when judgment was entered.

As stated by the Court in Fusari v. Steinberg, 42 L. Ed. 2d 521, 528 (1975) where an intervening statute significantly altered the prior statutory pattern:

> This court must review the District Court's judgment in light of presently existing Connecticut law, not the law in effect at the time that judgment was rendered.

See, also, Diffenderfer v. Central Baptist Church, 404 U.S. 412, 414 (1972). To render any decision on the constitutionality of the prior statute would be a mere advisory opinion on abstract propositions of law. See, Diffenderfer v. Central Baptist Church, supra; Hall v. Beals, 396 U.S. 45, 48 (1969).

In a similar case, Lynch v Household Finance Co. 360 F Supp. 720 (DC Conn. 1973), the District Court found Connecticut's garnishment statute unconstitutional for failure to provide a hearing prior to the garnishment. In that case the Court made "...no attempt to delineate or describe the kind of notice that must be given or the type of hearing that must be held." at 723. That responsibility, the court found, rested in the hands of the legislature. In fact, when the legislature did act by the passage of the prejudgment remedy Act, PA 73-431, now Conn. General Statutes Section 52-278a et seq., the legislature did not invalidate garnishments and attachments which had been made under the unconstitutional Connecticut Statute but provided for a validation procedure, Conn. Gen. Stat. Section 52-278g, which provision has not been subjected to constitutional challenge.

Hence, where a case has become moot pending a decision, it may be remanded to the District Court for dismissal. United States v. Munsingwear, Inc. 340 U.S. 35, 39, and n.2 (1950).

II

The Plaintiff asserts that the right to seek a determination of the validity of the mechanic's lien pursuant to section 8 of P.A. 75-418 does not provide effective relief. Yet, at any time, even prior to the enactment of P.A. 75-418, the Plaintiff could have challenged the validity of the underlying lien in state courts pursuant to a remedy provided by Conn. Gen. Stat. (Rev. 1958, Supp. 1975) Sec. 49-51 which provides that

> Any person having an interest in any real estate described in any certificate of lien, which lien is invalid but not discharged of record, may give written notice to the lienor

> to discharge the same in the office where recorded, and may, if such request is not complied within thirty days, bring his complaint to the court which would have jurisdiction of the foreclosure of such lien, if valid, claiming such discharge, and such court may adjudge the validity or invalidity of such lien and may award the plaintiff damages for the failure of the defendant to make discharge upon request, and a certified copy of such judgment of invalidity recorded on the land records of the town where such certificate of lien was filed shall fully discharge the same.

This procedure has been available for over twenty-five years. See, Garofolo vs. Permacrete Corp., 15 Conn. Sup. 358 (1948).

III

The interference with property rights caused by the imposition of the mechanic's lien, particularly after the substitution of a bond which was a voluntary act by Brookhollow, does not raise a constitutional question. In Spielman-Fond, Inc. vs. Hansons, Inc., 379 F. Sup. 997 (D. Ariz.) affd 417 U.S. 901, 94 S. Ct. 2596, 41 L Ed 2d 208, a three Judge court in upholding the Arizona mechanic's lien laws (which provide about the same protection to a commercial owner as did Connecticut's lien law) emphasized the insubstantial nature of the interference with a property interest posed by the laws:

> "It cannot be denied that the effect of such liens may make it difficult to alienate the property. If the plaintiffs can find a willing buyer, however, there is nothing in the statutes or the liens which prohibits the consummation of the transaction. Even though a willing buyer may be more difficult to find, once he is found there is nothing to prevent plaintiffs from making the sale to him. The liens do nothing more than impinge upon economic interests of the property owner. The right to alienate has not been harmed, and the difficulties which the lien creates may be ameliorated through the use of bonding or title insurance." accord,

Ruocco v. Brinker, 43 U.S.L.W. 2056 (S.D. Fla. Sept. 9, 1974) (3-judge court)

As the District Court observed in its memorandum of decision

> Brook Hollow tries to distinguish Spielman-Fond on the ground that in that case no mortgage (or other alienation) commitment had yet been obtained and was being interfered with, whereas here one had been obtained. As the language above indicates, however, such a distinction is untenable: the Spielman-Fond court decided that there would be no significant interference with an obtained commitment to alienate the property. Memorandum of Decision, page 10.

Hence, the Defendant submits that the question presented is clearly unsubstantial as it has already been directly ruled on by the United States Supreme Court by its summary affirmance of Spielman-Fond, Inc. See, Hagans v. Lavine, 415 U.S. 528, 534-543 (1974) and cases cited thereon.

IV

The plaintiff is not entitled to damages where defendant has at all times pursued the relevant statutory procedures. In Tucker v. Maher, 497 F. 2d 1309 (2nd Cir. 1974), cert den. 419 U.S. 997 (1974), a property owner brought an action challenging the constitutionality of Connecticut's materialmen's lien and prejudgment attachment statutes and sought to recover damages under the civil rights act against a subcontractor, counsel, and others. The court held that those acting pursuant to the statutes then in existence could not be required to answer in damages to the property owner:

> Constitutional law, particularly in this confusing area of state action and due process, is hardly predictable with any degree of certainty....We think as a majority of this court did in Fleming v. McEnany, [491 F.2d 1353 (2d Cir 1974)], that counsel here had a right to rely on the statutory law of the jurisdiction which had not been repealed or replaced, or declared unconstitutional by any competent court at the time it was utilized. 497 F. 2d at 1315-16.

And, see, Fleming v McEnany, supra; Rios v Cessna Fin. Corp., 488 F. 2d 25 (10th Cir. 1973).

Further, plaintiff has never, in fact, attempted to challenge the validity of the underlying obligation as he might have (Conn. Gen. Statutes, Sec. 49-51), and should not be permitted to thrust the burden of his purported damages on the defendant who at all times was engaged in following statutory procedures to protect the value of goods and services supplied to plaintiff.

V

The necessary state action that would provide jurisdiction under 42 U.S.C. Section 1983 is not present in this case. To come within the purview of the 14th Amendment a Plaintiff must allege facts which will support Federal jurisdictional requirements. In Burton v. Wilmington Parking Authority 365 U.S. 715, 721, 81 S.Ct. 856, 861 (1961) in discussing the Equal Protection Clause of the 14th Amendment, the Court said in 365 U.S. at page 721:

> "...Individual invasion of individual rights is not the subject matter of the Amendment and the private conduct abridging individual rights does no violence to the Equal Protection Clause unless to some significant extent the State in any of its manifestations has been found to be involved in it. ..." (Emphasis added.)

Before Federal Courts reach the substantive question raised as to the constitutionality of State statutes, it has been incumbent upon such courts to consider whether there has been a State involvement. Reitman v. Mulkey 387 U.S. 369, 375 87 S.Ct. 1627, 1631 (1967); Shirley v. State National Bank of Connecticut 493 F.2d 739 (2d Cir. 1974). Bond v. Dentzer, 494 F.2d 302 (2d Cir. 1974). Jackson v. Statler Foundation, 496 F.2d 623 (2d Cir. 1974) Fuentes v. Shevin 407 U.S. 67, 95, 92 S.Ct. 1983 (1972) and Sniadach v. Family Finance Corp. 395 U.S. 337, 89 S.Ct. 1820, 23 L. Ed 2d 349 (1969).

Although the concept of state action is a troublesome area the cases establish some guidelines to test whether state action is involved. Courts have found state action if the statute causes the State to make itself a partner of one of the individuals involved in the transaction, delivers a State function to creditors which was traditionally performed by the State. Yet some cases restrict their conclusion to the simple test of whether, after examination of the facts and the particular statute, a significant State involvement exists. Still others resolve the state action question by "sifting facts and weighing circumstances on a case by case basis" as the Court did in Reitman v. Mulkey, supra, 387 U.S. at page 378. Connecticut's Mechanic's Lien statutes do not involve the participation of any state officer or agent as found to exist in the statutes discussed in Fuentes v. Shevin, supra, and Sniadach v. Family Finance Corp., supra. The enactment of the Mechanic's Lien statute in Connecticut cannot be said to "encourage" the transaction - that is, subcontractors entering a business relationship with the general contractor. See, Bond v. Dentzer, supra, Shirley v. State National Bank of Connecticut, supra. In Reitman v. Mulkey, supra, the effective repeal of the California statute involved in that case encouraged racial discrimination. And, in Burton v. Wilmington Parking Authority, supra, by providing a lower rent indirectly to the lessee of a restaurant in a municipal parking authority complex, the State became a partner of the lessee by not taxing the facility. While it may be true that no common law rights existed to establish mechanics liens, the great and immediate need for such statutes is referred by the U.S. Supreme Court when it validated Mechanic's Lien

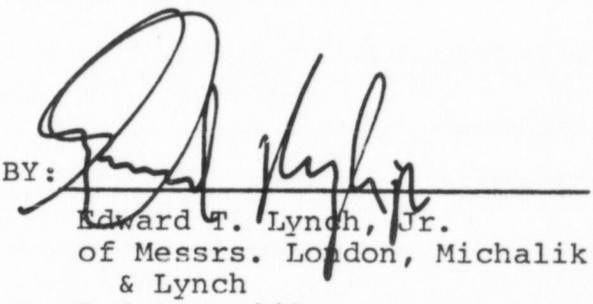
laws in the case of Great Southern Fire Proof Hotel v. Jones, supra, 193 U.S. 532 (1904). Since the placement of the lien is effected without the involvement of the Court system, we see no traditional rights transferred from the State to creditors. But, if the utilization of the Town Clerk's Office for the placement of the lien creates rights which did not exist prior to the enactment of the Mechanic's Lien laws we urge that this is not a significant state involvement. In considering the self-help repossession under Article IX of the Uniform Commercial Code, Courts have stated that the test is not state involvement in the activity but significant State involvement. Noting that state statutes and laws regulate many forms of purely private activity including contractual relationships courts have added that subjecting all behavior that conforms to state law to the 14th Amendment may emasculate the state action concept. See, Hill vs Michigan National Bank of Detroit, 58 Mich App. 430, 228 N.W. 2d 407 (1975); Gibbs vs Titelman, 502 F. 2d 1107 (3rd Cir., 1974); Nowlin vs. Professional Sales, Inc., 496 F. 2d 16 (8th Cir., 1974); James v. Pinnix, 495 F 2d 206 (5th Cir., 1974); Shirley vs State National Bank of Connecticut, 493 F. 2d 739 (2nd Cir., 1974); Adams vs. Southern California First National Bank, 492 F. 2d 324 (9th Cir., 1973). Hence it should be clear that in the present case the state did not exert any control over the creditors decision to file the mechanics lien; the private action by the Defendant, Andrulot, was not commanded by the permissive statute.

CONCLUSION

For the preceding reasons, the Defendant, Warren Andrulot, respectfully asks this court to affirm the decision of the District Court or to dismiss this appeal because of the intervening decision in the Roundhouse case by the Connecticut Supreme Court and because of the enactment of P.A. 75-418.

Warren Andrulot

Appellee,

BY: 

Edward T. Lynch, Jr.
of Messrs. London, Michalik
& Lynch
P.O. Box 349
33 Lexington Street
New Britain, Connecticut 06050
Telephone: (203)-225-6309